3 Timberlane Road Realty Trust

v.

Town of Windham

Docket No.: 23585-07PT

DECISION

The "Taxpayer" appeals, pursuant to RSA 76:16-a, the "Town's" 2007 assessment of $948,700 (land $248,000; building $700,700) on Map 24/F/Lot 156, a single family home on 2.42 acres (the "Property"). For the reasons stated below, the appeal for abatement is denied.

The Taxpayer has the burden of showing, by a preponderance of the evidence, the assessment was disproportionately high or unlawful, resulting in the Taxpayer paying a disproportionate share of taxes. See RSA 76:16-a; Tax 201.27(f); Tax 203.09(a); Appeal of City of Nashua, 138 N.H. 261, 265 (1994). To establish disproportionality, the Taxpayer must show the Property's assessment was higher than the general level of assessment in the municipality. Id. We find the Taxpayer failed to prove disproportionality.

The Taxpayer argued the assessment was excessive because:

(1) although the Property was purchased in December, 2005 for $960,000, the purchase included furnishings valued at $28,000, as stated in the appeal document;

(2) a neighboring house, at 5 Timberlane Road, is assessed for less ($822,400) despite being comparable in quality and having more square footage;

(3) a Comparative Market Analysis prepared by Deborah Proulx of Innovative Realty estimated a lower market value ($742,121) for the Property and another sales associate with this firm, Chris Tryon, believes real estate values "dropped like a rock" from the time of purchase in December, 2005 to April 1, 2007 - as much as a 20-30% drop in that time frame; and

(4) the assessment should be abated to $742,121 adjusted by the level of assessment.

The Town argued the assessment was proper because:

(1) as shown in Municipality Exhibit A, the signed Purchase and Sales Agreement, the agreed upon purchase price of the Property was $980,000 and this price included the furnishings described in paragraph 11 of this agreement;

(2) the PA-34 form (Municipality Exhibit B) signed by the Taxpayer's trustee, Mary DeRosa, stated the sale price was $960,400 and that it did not include any non-taxable personal property;

(3) in tax year 2006, the Town performed a full revaluation of all taxable property;

(4) the Taxpayer's reliance on the assessment of 5 Timberlane Road is misplaced because the assessment-record card for that property (Municipality Exhibit C) reflects differences in style and quality denoted in its lower grade and it is also possible that property was underassessed by the Town in tax year 2007;

(5) it was improper for the Taxpayer to attempt to introduce an appraisal as evidence at the hearing for the reasons presented at the hearing (and also stated in the Town's "Memorandum," see pp. 3-5) and the board correctly granted the Town's oral motion to exclude the appraisal;

(6) an analysis prepared by the Town's assessor, Rex A. Norman, CNHA, estimates the market value of the Property was $970,000 as of April 1, 2007; and

(7) the Taxpayer failed to meet its burden of proof.

The parties agreed the level of assessment in the Town was 98.8% for tax year 2007, the median ratio computed by the department of revenue administration.

Board's Rulings

As stated from the bench, the board was required to address a preliminary, procedural issue because of the tardiness of the Taxpayer (a trust represented at the hearing by the trustee's attorney, R. David Cohen, Esq., and her son, Christopher DeRosa, who indicated his mother is 80 years old). These individuals were tardy in coming to the hearing room, creating unnecessary delay to the board and the Town and causing the hearing not to begin until after 9:30 a.m. The hearing was noticed and scheduled to begin at 9:00 a.m. and this delay raised the question of whether the Taxpayer should be defaulted for lack of timely hearing attendance as provided in Tax 202.06(i).[1]

The board asked the Town, represented by Bernard H. Campbell, Esq., its position on this question. The Town responded it was willing to proceed with the hearing.

[1] Tax 202.06(i) provides, as follows:

> If a taxpayer did not file a request for leave to not attend a hearing and fails to attend a hearing or fails to appear for the hearing within 30 minutes of the scheduled hearing time, no hearing shall be held and the taxpayer shall be finally defaulted, and the appeal marked: "taxpayer finally defaulted; no further action" except the municipality shall have 10 days after the clerk's date on the order to file a request for costs under Tax 201.39.

The board considered the Town's response and also noted the Taxpayer's two representatives (Attorney Cohen and Mr. DeRosa), although not arriving in the hearing room by 9:30 a.m., were on the building grounds by that time. Attorney Cohen is licensed to practice in Massachusetts and, in mitigation, apologized for the delay and the inconvenience caused by the tardiness, which he indicated was inadvertent and therefore asked the board to excuse.

After deliberating, the board decided to waive the effect of its rule requiring timely attendance (Tax 202.06(i)) and proceed to a hearing on the merits of this appeal. Although the rule addresses the importance of timely hearing attendance for the consistent, just and expeditious disposition of all matters before the board, the board has the power to waive the application of its rules in appropriate circumstances. See Tax 101.01(b); cf. Tax 201.41(b).

Based on the evidence submitted by the Taxpayer, the board finds the Taxpayer failed to carry its burden. As summarized on page 1, the Taxpayer has the burden of proof to show that the Town's assessment was disproportionate relative to market value and the Town's level of assessment. For the reasons that follow, the board finds the arguments and evidence submitted by the Taxpayer fell short of carrying this burden.

First, the board is unable to give any weight to the Proulx Comparative Market Analysis value conclusion for several reasons. Mrs. Proulx was an employee of Innovative Realty. Mr. Christopher DeRosa testified Innovative Realty is a real estate company which he is a principal owner of and which handles most of the marketing and closings of properties he develops in southern New Hampshire. Mr. DeRosa testified this Comparative Market Analysis was done for his mother, trustee for the Taxpayer. Due to the familial relationship between the owner of the company performing the market analysis and the trustee of the Property, there is an inherent question as to the reliability and unbiased nature of such an analysis.

Second, Ms. Proulx is no longer employed by Innovative Realty and did not attend the hearing to testify, defend her value conclusions and answer questions such as her choice of sale comparables and the value correlation presented in the Comparative Market Analysis, which weakened its credibility.

Third, as Mr. Norman, the Town's assessor, testified, most of the properties relied upon in the Comparative Market Analysis are in inferior neighborhoods than the Taxpayer's. The Taxpayer presented no evidence to rebut this conclusion.

The Taxpayer's comparison to the assessment of 5 Timberlane Road does not satisfy the Taxpayer's burden of proving the Property is overassessed. The testimony of Mr. Norman, as well as the assessment-record cards (in Municipality Exhibits C and D), indicate 5 Timberlane Road was graded lower than the Property. Even if 5 Timberlane Road is assumed to be of similar quality, it is possible that property is underassessed (rather than the Property being overassessed). Both Mr. Norman and the Proulx Comparative Market Analysis note the Taxpayer's and 5 Timberlane Road properties are in a "million dollar neighborhood" and thus the $822,400 assessment of 5 Timberlane Road may be too low. The Taxpayer's own witness, Mr. Tryon, admitted he "didn't know" if 5 Timberlane Road was underassessed.

To the extent 5 Timberlane Road may be underassessed, the underassessment of other properties does not prove the overassessment of the Property. See Appeal of Cannata, 129 N.H. 399, 401 (1987). For the board to reduce the Taxpayer's assessment because of underassessment on one or more other properties would be analogous to a weights and measures inspector sawing off the yardstick of one tailor to conform with the shortness of the yardsticks of the other tailors in town rather than having them all conform to the standard yardstick. The courts have held that in measuring tax burden, market value is the proper yardstick to determine proportionality, not

just a simple comparison to one other property. Id. The board would encourage the Town under its RSA 75:8 responsibilities to review the assessment for 5 Timberlane Road for the current tax year (2010) to determine whether any adjustment or correction is warranted.

Conflicting evidence was submitted as to whether the Taxpayer's purchase price of $960,000 included personal property. The Purchase and Sales Agreement (Municipality Exhibit A, in paragraph 11) itemizes some personal property that was included in the stated $980,000 purchase price. Mr. DeRosa testified there were additional furnishings of value left with the Property that was not itemized in this agreement. This testimony, however, conflicts with the PA-34, signed by the Taxpayer's trustee, Mary T. DeRosa (Municipality Exhibit B) which states the actual $960,400 sale price did not include any personal property. Mr. DeRosa also testified it was his recollection the Purchase and Sales Agreement agreed upon sale price of $980,000 was reduced to $960,000 due to problems, such as a cracked foundation, identified on a "walk through" between the time of the Purchase and Sales Agreement and the closing of the purchase of the Property in 2005. Based on the preponderance of the evidence (Tax 201.27(f)), largely the documentary evidence versus Mr. DeRosa's recollection, the board finds the Taxpayer failed to carry its burden that the $960,000 purchase price still included a material amount of personal property.

Moreover, even if the $960,000 sale price did include $28,000 of furniture as the Taxpayer's appeal asserts, it equates to less than 3% of the gross sale price and is a *de minimis* factor that does not warrant an abatement.

> The statute makes the proceeding for the abatement of a tax a summary one, free from technical and formal obstructions. The question is, Does justice require an abatement? It is a broad and comprehensive inquiry, not to be restricted by artificial, arbitrary, immutable rules, inconsistent with the substantial justice which the statute was designed to secure. The investigation must have reasonable

> limits.... The justice to be administered is to be sufficiently exact for the practical purpose of the legislature, who did not intend to invite the parties to a struggle for costs, or a ruinous contention about trifles. The points to be considered are such as the nature of each particular case presents. They cannot be fixed by an invariable rule.

Manchester Mills v. City of Manchester, 58 N.H. 38 (1876); quoted in Delgado v. Town of Sandwich, BTLA Docket No. 21003-04PT (January 25, 2007) and other appeals decided by the board.

The Taxpayer also asserted the market had declined significantly between the time the Property was purchased in December, 2006 and April 1, 2007 and thus the assessment should reflect such a market decline. The board is unable to give any weight to Mr. Tryon's testimony the market had dropped 20-30% during that time period because no documentary market evidence was submitted and he relied instead on his experience as a sales associate at Innovative Realty.

Mr. Norman testified it was his opinion, based upon analyzing sales in 2006 and 2007, the market had declined approximately 5% between April 1, 2006 to April 1, 2007. Mr. Norman's assertion is generally borne out by the change in both the median and weighted mean ratios for the Town of Windham in 2006 and 2007. The median ratio in 2006 was 95.8% and in 2007 was 98.8% indicating an approximate 3% decline in market value. The 2006 weighted mean ratio for the Town of Windham was 94.7% and in 2007 was 100%, also indicating approximately a 5% decline in market value.

While it is conceivable Mr. Tryon's opinion was based on the real estate market declining at differing and greater rates in other communities, the evidence relative to Windham indicates no decline in the market of the magnitude of 20-30% as asserted by the Taxpayer. Further, it is inappropriate to take a single property transaction, such as the purchase of the Property by the

Taxpayer in 2005, and adjust it by a market condition factor to arrive at the proper assessment. As Mr. Norman testified, the mass appraisal process employed by municipalities involves considering all sales to discern a market pattern to create assessment models for different types of property. Consequently, it is not reasonable to expect any one assessment to exactly reflect or be derived from the sale of a single property. Sales are proxies for market value, will vary based on the subjectivity of the individuals involved and, thus, "market value" can best be discerned from the correlation of a number of sales, not just one.

The board finds the best evidence of market value of the Property is contained in Mr. Norman's analysis (Municipality Exhibit D) where he analyzed the sales of eight properties and estimated the Property's market value as of April 1, 2007 to be $970,000. Mr. Norman further explained the various neighborhoods in Windham that were established by sales as depicted on the map submitted as Municipality Exhibit E. The Taxpayer's neighborhood, known as Heritage Hill, contains substantial properties that have sold in the $900,000 to $1,100,000 range (see comparables 1- 4 in Municipality Exhibit D.)

For all these reasons, the board could give little weight to the Taxpayer's several arguments, including the market value estimate of $742,121. Thus, the Taxpayer failed to carry its burden and the appeal is dismissed.

A motion for rehearing, reconsideration or clarification (collectively "rehearing motion") of this decision must be filed within thirty (30) days of the clerk's date below, not the date this decision is received. RSA 541:3; Tax 201.37. The rehearing motion must state with specificity all of the reasons supporting the request. RSA 541:4; Tax 201.37(b). A rehearing motion is granted only if the moving party establishes: 1) the decision needs clarification; or 2) based on the evidence and arguments submitted to the board, the board's decision was erroneous in fact or

in law. Thus, new evidence and new arguments are only allowed in very limited circumstances as stated in board rule Tax 201.37(g). Filing a rehearing motion is a prerequisite for appealing to the supreme court, and the grounds on appeal are limited to those stated in the rehearing motion. RSA 541:6. Generally, if the board denies the rehearing motion, an appeal to the supreme court must be filed within thirty (30) days of the date on the board's denial.

SO ORDERED.

BOARD OF TAX AND LAND APPEALS

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Paul B. Franklin, Chairman

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Albert F. Shamash, Esq., Member

Certification

I hereby certify a copy of the foregoing Decision has this date been mailed, postage prepaid, to: R. David Cohen, Esq., 92 High Street - Suite 41, Medford, MA 02155, counsel for 3 Timberland Road Realty Trust, Taxpayer; Chairman, Board of Selectmen, Town of Windham, PO Box 120, Windham, NH 03087; and Bernard H. Campbell, Esq., Beaumont & Campbell Prof. Assn., 1 Stiles Road - Suite 107, Salem, NH 03079, counsel for the Town.

Date: April 6, 2010

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Anne M. Stelmach, Clerk